

## 1 UNITED STATES DISTRICT COURT

## 2 DISTRICT OF NEVADA

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4 KARY PATRICK MACLEOD COLVIN,

5 Plaintiff,

6 v.

7 WASHOE COUNTY DA OFFICE, *et. al.*,

8 Defendants.

Case No. 3:23-CV-00212-ART-CLB

9 **REPORT AND RECOMMENDATION OF**  
**U.S. MAGISTRATE JUDGE<sup>1</sup>**

10 Before the Court is Plaintiff Kary Patrick MacLeod Colvin’s (“Colvin”), application  
 11 to proceed *in forma pauperis* (ECF No. 1), and civil rights complaint, (ECF No. 1-1). For  
 12 the reasons stated below, the Court recommends that Colvin’s *in forma pauperis*  
 13 application, (ECF No. 1), be denied as moot, and his complaint (ECF No. 1-1), be  
 14 dismissed without prejudice and without leave to amend.

15 **I. IN FORMA PAUPERIS APPLICATION**

16 A person may be granted permission to proceed *in forma pauperis* (“IFP”) if the  
 17 person “submits an affidavit that includes a statement of all assets such [person]  
 18 possesses [and] that the person is unable to pay such fees or give security therefore.  
 19 Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief  
 20 that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d  
 21 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed  
 22 IFP, not just prisoner actions).

23 Pursuant to the LSR 1-1: “Any person who is unable to prepay the fees in a civil  
 24 case may apply to the court for authority to proceed [IFP]. The application must be made  
 25 on the form provided by the court and must include a financial affidavit disclosing the

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26 <sup>1</sup> This Report and Recommendation is made to the Honorable Anne R. Traum,  
 27 United States District Judge. The action was referred to the undersigned Magistrate  
 28 Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 applicant's income, assets, expenses, and liabilities."

2 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with  
 3 some particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th  
 4 Cir. 1981) (quotation marks and citation omitted). A litigant need not "be absolutely  
 5 destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*,  
 6 335 U.S. 331, 339 (1948).

7 A review of the application to proceed IFP reveals Colvin cannot pay the filing fee,  
 8 thus the Court recommends that Colvin not be assessed the filing fee and the motion be  
 9 denied as moot. (ECF No. 1.)

## 10 **II. SCREENING STANDARD**

11 Prior to ordering service on any Defendant, the Court is required to screen an *in*  
 12 *forma pauperis* complaint to determine whether dismissal is appropriate under certain  
 13 circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28  
 14 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint  
 15 for the enumerated reasons). Such screening is required before a litigation proceeding  
 16 *in forma pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507  
 17 (9th Cir. 2015).

18 "[T]he court shall dismiss the case at any time if the court determines that – (A)  
 19 the allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or  
 20 malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks  
 21 monetary relief against a defendant who is immune from such relief." 28 U.S.C. §  
 22 1915(e)(2)(A), (B)(i)-(iii).

23 Dismissal of a complaint for failure to state a claim upon which relief may be  
 24 granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. §  
 25 1915(e)(2)(B)(ii) tracks that language. When reviewing the adequacy of a complaint  
 26 under this statute, the Court applies the same standard as is applied under Rule 12(b)(6).  
 27 See, e.g., *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) ("The standard for  
 28 determining whether a plaintiff has failed to state a claim upon which relief can be granted

1 under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of Civil Procedure 12(b)(6)  
 2 standard for failure to state a claim.”). Review under Rule 12(b)(6) is essentially a ruling  
 3 on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir.  
 4 2000) (citation omitted).

5 The Court must accept as true the allegations, construe the pleadings in the light  
 6 most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v.*  
 7 *McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in *pro se* complaints  
 8 are “held to less stringent standards than formal pleadings drafted by lawyers[.]” *Hughes*  
 9 *v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

10 A complaint must contain more than a “formulaic recitation of the elements of a  
 11 cause of actions,” it must contain factual allegations sufficient to “raise a right to relief  
 12 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).  
 13 “The pleading must contain something more. . . than. . . a statement of facts that merely  
 14 creates a suspicion [of] a legally cognizable right of action.” *Id.* (citation and quotation  
 15 marks omitted). At a minimum, a plaintiff should include “enough facts to state a claim to  
 16 relief that is plausible on its face.” *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662,  
 17 678 (2009).

18 A dismissal should not be without leave to amend unless it is clear from the face  
 19 of the complaint the action is frivolous and could not be amended to state a federal claim,  
 20 or the district court lacks subject matter jurisdiction over the action. *See Cato v. United*  
 21 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th  
 22 Cir. 1990).

23 **III. SCREENING OF COMPLAINT**

24 In his complaint, Colvin sues Defendants Washoe County District Attorney’s  
 25 Office, Robert DeLong, Esq., and Christopher Hicks, Esq. (collectively referred to as  
 26 “Defendants”) under 42 U.S.C. § 1983. (See ECF No. 1-1.) While scant in detail, Colvin’s  
 27 complaint seems to assert constitutional violations based on an arrest, a bond hearing  
 28 that utilized juvenile records, and denial of legal representation upon arrest, which relate

1 to an underlying state criminal case. (*Id.* at 1-2.) Colvin requests “dismissal of all  
 2 allegations and charges,” other injunctive relief, and monetary damages. (*Id.* at 2.)

3 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority  
 4 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d  
 5 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir.  
 6 2000)). The statute “provides a federal cause of action against any person who, acting  
 7 under color of state law, deprives another of his federal rights[,]” *Conn v. Gabbert*, 526  
 8 U.S. 286, 290 (1999), and is “merely . . . the procedural device for enforcing substantive  
 9 provisions of the Constitution and federal statutes.” *Crumpton v. Gates*, 947 F.2d 1418,  
 10 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the violation  
 11 of a federally-protected right by (2) a person or official who acts under the color of state  
 12 law. *Anderson*, 451 F.3d at 1067.

13 However, § 1983 is not a backdoor through which a federal court may overturn a  
 14 state court conviction or award relief related to the fact or duration of a sentence. Section  
 15 1983 and “the federal habeas corpus statute . . . both provide access to the federal courts  
 16 ‘for claims of unconstitutional treatment at the hands of state officials, . . . [but] they  
 17 different in their scope and operation.’” *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir.  
 18 2003) (quoting *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). Federal courts must take  
 19 care to prevent prisoners from relying on § 1983 to subvert the differing procedural  
 20 requirements of *habeas corpus* proceedings under 28 U.S.C. § 2254. *Heck*, 512 U.S. at  
 21 486-87; *Simpson v. Thomas*, 528 F.3d 685, 695 (9th Cir. 2008). When a prisoner  
 22 challenges the legality or duration of his custody, raises a constitutional challenge which  
 23 could entitle him to an earlier release, or seeks damages for purported deficiencies in his  
 24 state court criminal case, which effected a conviction or lengthier sentence, his sole  
 25 federal remedy is a writ of *habeas corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997);  
 26 *Heck*, 512 U.S. at 481; *Wolf v. McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v.*  
 27 *Rodriguez*, 411 U.S. 475 (1973); *Simpson*, 528 F.3d at 692-93. Stated differently, where  
 28 “a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction

1 or sentence,” then “the complaint must be dismissed unless the plaintiff can demonstrate  
 2 that the conviction or sentence has already been invalidated.” *Heck*, 512 U.S. at 487.

3 It appears that Colvin is challenging the constitutionality of his state court criminal  
 4 conviction. Consequently, he must demonstrate that his conviction has been overturned  
 5 to proceed in an action under § 1983. As he has not done so, his sole relief is a *habeas*  
 6 *corpus* action.

7 Further, to the extent Colvin may be asking the Court to intervene in ongoing state  
 8 criminal proceedings, the *Younger* abstention doctrine prevents federal courts from  
 9 interfering with pending state criminal proceedings even if there is an allegation of a  
 10 constitutional violation, unless there is an extraordinary circumstance that creates a  
 11 threat of irreparable injury. *Younger v. Harris*, 401 U.S. 37 (1971). The Supreme Court  
 12 has stated that “federal-court abstention is required” when there is “a parallel, pending  
 13 state criminal proceeding.” *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013); see  
 14 also *Heck v. Humphrey*, 512 U.S. 477, 487 n.8 (1994) (noting that when a state criminal  
 15 defendant brings a federal civil rights lawsuit while his criminal charges are pending,  
 16 abstention is “an appropriate response to the parallel state-court proceedings”).

17 To determine if *Younger* abstention applies, federal courts look to whether the  
 18 state criminal proceeding is “(1) ongoing, (2) implicate[s] important state interests, and  
 19 (3) provide[s] an adequate opportunity... to raise constitutional challenges.” *Herrera v.*  
*20 City of Palmdale*, 918 F.3d 1037, 1044 (9th Cir. 2019) (internal quotation marks omitted);  
 21 see also *Younger*, 401 U.S. 37. The Ninth Circuit also requires that “[t]he requested relief  
 22 must seek to enjoin—or have the practical effect of enjoining—ongoing state  
 23 proceedings.” *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 758  
 24 (9th Cir. 2014) (citing *AmehsourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir.  
 25 2007)). Because it appears Colvin’s criminal case may still be pending, all prerequisites  
 26 of the *Younger* abstention doctrine are present. Colvin is the subject of an ongoing  
 27 criminal proceeding in state court that has not reached final adjudication. The State of  
 28 Nevada has an important interest in protecting the public through the prosecution of

1 criminal proceedings. Further, the state court criminal proceedings would afford an  
2 opportunity for Colvin to raise the constitutional claims asserted in the Complaint.

3 Finally, the Court notes that defendants with the district attorney's office are likely  
4 absolutely immune from suit under § 1983. See *Imbler v. Pachtman*, 424 U.S. 409, 427,  
5 430 (1976) (state prosecutors are absolutely immune from § 1983 actions when  
6 performing functions "intimately associated with the judicial phase of the criminal  
7 process.").

8 For these reasons, the Court recommends that the complaint be dismissed  
9 without prejudice and without leave to amend.

10 **IV. CONCLUSION**

11 For good cause appearing and for the reasons stated above, the Court  
12 recommends that Colvin's application to proceed *in forma pauperis*, (ECF No. 1), be  
13 denied as moot, and his complaint, (ECF No. 1-1), be dismissed without prejudice and  
14 without leave to amend.

15 The parties are advised:

16 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of  
17 Practice, the parties may file specific written objections to this Report and  
18 Recommendation within fourteen days of receipt. These objections should be entitled  
19 "Objections to Magistrate Judge's Report and Recommendation" and should be  
20 accompanied by points and authorities for consideration by the District Court.

21 2. This Report and Recommendation is not an appealable order and any  
22 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the  
23 District Court's judgment.

24 **V. RECOMMENDATION**

25 **IT IS THEREFORE RECOMMENDED** that Colvin's application to proceed *in forma*  
26 *pauperis*, (ECF No. 1), be **DENIED AS MOOT**;

27 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint, (ECF No. 1-  
28 1); and,

1           **IT IS FURTHER RECOMMENDED** that Colvin's complaint, (ECF No. 1-1), be  
2 **DISMISSED WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND.**

3 **DATED:** May 30, 2023.

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5 **UNITED STATES MAGISTRATE JUDGE**

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